DATE: AUGUST 30, 1996

CASE NO: 94-INA-568

In the matter of

GAIL BRATMAN
Employer

on behalf of

MERCEDES SILVA
Alien

Before: Huddleston, Jarvis and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Gail Bratman's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 13, 1993, Employer filed a Form ETA 750, Application for Alien Employment Certification with the New York Department of Labor ("NYDOL") on behalf of the Alien, Mercedes Silva. The job opportunity was listed as Live in Cook. (AF 52). The application required two years experience in the job or two years experience in the related occupation of Domestic, with cooking experience. (Id). NYDOL assigned the occupational title Cook (Household)(DOT 305.281-010) to the job. (Id).

The job was advertised and NYDOL referred one applicant to Employer. (AF 15). On January 3, 1994, Employer sent a Report of Recruitment to NYDOL which indicated that the U.S. applicant was not hired because she was not qualified. (AF 21). The application was transmitted to the CO. (AF 29).

On April 8, 1994, the CO issued a Notice of Findings ("NOF") in which she proposed to deny the application. (AF 34). The CO found that the alternate requirement of two years experience as a Houseworker was excessive and restrictive. (AF 33). Employer was required to delete this requirement or establish that it arises from business necessity. (Id). The CO questioned whether the live-in requirement was justified by business necessity and Employer was required to justify the requirement. (AF 32-33).

Employer filed a timely rebuttal to the NOF in which she furnished information about business necessity for the live-in requirement. (AF 35-44). The rebuttal did not address the alternate experience requirement.

On May 19, 1994, the CO issued a Final Determination in which she denied certification. (AF 54). The sole basis for denial was that the related experience of two years as a Houseworker, General exceeded the SVP of one to three months for that position. (AF 53).

Employer filed a request for review. (AF 56). She contends that the denial is erroneous and that the SVP for the related experience does not have to conform to the years of experience for the related experience. (Id).

DISCUSSION

This case is on all fours with Henry L. Malloy (Mr. & Mrs.), 93-INA-355(Oct. 5, 1994) and we are in the position articulated by former Chief Judge Litt in his concurring opinion. We

reluctantly reverse because the CO did not properly identify and rule on a primary issue, develop another significant issue and relied on an improper standard in denying the application.

The record indicates that the Alien did not meet the minimum job requirements because all or half of her qualifying experience was obtained while working for the Employer. The evidence submitted by Employer contains inconsistencies about the Alien's job experience. Employer's letter of May 10, 1994, submitted as part of the rebuttal, contradicts the ETA 750, Part B filled out by the Alien. The Alien states that she worked for Employer as a Live-in Cook from 3-90 to 6-92. (AF 36). Employer's letter states that the Alien previously worked two years for her as a housekeeper. (AF 42). The letter says nothing about the Alien performing cooking duties during that period. Employer should have been required to rebut why she was not treating U.S. workers in the same manner. Rocco Parente, 92-INA-248 (August 2, 1993); Salad Bowl Restaurant/Ayhan Brothers Food, 90-INA-200 (May 23, 1991). However, since this issue was not raised by the CO, it is not before the Board on review. International Student Exchange of Iowa, Inc., 89-INA-261 (April 21, 1992).

The NOF required Employer to submit the following documentation:

a. who is doing the household chores, if the alien is only doing the duties of a Cook;

b. the tasks performed on a daily/hourly work schedule;

c. clearly establish, with particulars, why a permanent full-time Cook must live-in;

d. how the absence of such requirement would handicap the ability of the employer to carry on the functions of her household, explaining how such needs were met prior to hiring the alien;

e. why a live-out Cook could not perform the same functions,

f. any other information that clearly establishes and demonstrates that this is a permanent full-time job offer and that the live-in requirement is essential to performance of the job, the absence of which would undermine the nature of the employer's household. (AF 31-32).

Employer's rebuttal did not respond to most of these requests. (AF 41-42). Yet, the FD found that Employer had successfully rebutted the need for a live-in Domestic Cook. (AF 53). In the light of the authorities previously cited, we are precluded from examining this determination.

The CO rested denial of certification solely on the finding that Employer had failed to rebut that:

> employer was advised that although her requirement of two years of experience in the job offer (Domestic Cook) meets the SVP requirement of one (1) to two (2) years of experience, the related experience of two (2) years as a Houseworker, General exceeds the SVP requirement of one (1) to three (3) months of experience for that position and was considered to be restrictive and excessive. (Id).

However, in Henry L. Malloy, supra, the decision held that:

> In this case, "Cook, Domestic" is under DOT coding 305.281-010, and "House Worker" under DOT coding 301.474-010. While the job description of "Cook, Domestic" involves exclusively preparing and cooking food, the job description of "House Worker" involves some cooking among other duties. Since Employers' experience requirement of "Houseworker with daily cooking duties" is only an alternative requirement, it is not unduly restrictive under Best Luggage, Inc. to require more experience than the SVP in the DOT for "House Worker."

The CO's determination is contrary to Malloy.

Since the only ground for denying the application is not sustainable, and we are precluded from considering other matters in the record, we reluctantly reverse and grant certification.

ORDER

The Final Determination denying certification is Reversed and the Certifying Officer is directed to grant certification.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/bg